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No. 05-

IN THE

Supreme Court of the United States

RICHARD GAMMICK; JOHN HELZER;
WASHOE COUNTY,

Petitioners,

v.

RENE BOTELLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the court of appeals has improperly added the element of intent to the absolute immunity function analysis by looking to the alleged motives of a prosecutor in deciding not to accept cases from a particular law enforcement officer.

2) Whether the court of appeals has improperly looked to the effect of the prosecutor's decision not to accept cases in applying the function analysis.

3) Whether the court of appeals improperly failed to look to state law to determine whether a prosecutor in Nevada acts as a policymaker for the state rather than the county in making prosecutorial decisions in criminal cases.

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OPINIONS BELOW

The reported decision of the Court of Appeals, filed June 23, 2005, is set forth at Appendix (App.) A. The order of the United States District Court, dated July 30, 2003 and entered August 5, 2003, is set forth at Appendix B. The order of the Court of Appeals denying petition for rehearing, filed August 3, 2005, is set forth at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 23, 2005. A timely petition for rehearing en banc was denied by order entered on August 3, 2005, and this petition for certiorari was filed within 90 days of that date. This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

The following items of relevant Nevada law are set forth in pertinent part, at Appendix D:

Nevada Constitution Article 6, § 13;

Nevada Revised Statutes (NRS) 169.055, 173.045, & 252.110.

Assembly Bill (AB) 477, Section 6.

STATEMENT OF THE CASE

Respondent Rene Botello filed a civil rights lawsuit against petitioners Gammick, Helzer, and Washoe County, in the District of Nevada, on or about April 14, 2003. *See* Docket item no. 2, Docket Sheet, Excerpts of Record (ER), p. 149. Plaintiff invoked the federal question jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1334, and sought declaratory relief pursuant to 28 U.S.C. § 2201. Defendants moved to dismiss on May 5, 2003. Docket no. 13, ER p. 149. In response to the motion, plaintiff Botello filed his First Amended Complaint on June 3, 2003. Docket no. 19, ER p. 150. Defendants again moved to dismiss. Docket no. 22, ER p. 150. Following briefing, the district court on July 31, 2003, granted defendants' motion in its entirety, dismissing the lawsuit. *See* Order, Appendix, pp. 17a-21a. Plaintiff filed his notice of appeal on August 27, 2003. Docket no. 32, ER p. 150. Following briefing and oral argument, the court of appeals in an opinion dated June 23, 2005, affirmed the district court in part, reversed in part, and remanded. Appendix, pp. 1a-16a. The panel's opinion is a reported decision, *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005).

Because this case was decided on a motion to dismiss, the facts at issue have been taken from the First Amended Complaint (FAC), ER 87-98. Plaintiff Botello was a detective for the Washoe County, Nevada, Sheriff's Office,

investigating child sex crimes. FAC, ER p. 88. He claims that he became convinced during one investigation of the incompetence of a nurse who regularly examined child sex crime victims. He further claims that he was accused by defendants Gammick and Helzer, the District Attorney of Washoe County and the Assistant District Attorney in charge of the Criminal Division of the office, of not being a "team player" and was told by them to "keep his mouth shut" about the nurse's testimony. FAC, ER p. 89. Instead, plaintiff Botello contacted the Nevada Attorney General's Office and the FBI, making accusations of a "possible cover-up" and "retaliation," although the nature of this retaliation is not identified. FAC, ER p. 89.

For reasons not stated in the complaint, plaintiff resigned from the sheriff's office and sought employment with the Washoe County School District Police Department. FAC, ER p. 90. Defendants Gammick and Helzer allegedly contacted the school district police chief, informing him that they would not prosecute cases investigated by Botello. FAC, ER p. 90. Defendants Gammick and Helzer informed the chief that Botello had given false testimony regarding an interrogation he had conducted. Plaintiff asserts that Gammick and Helzer knew this accusation to be false. FAC, ER p. 90. Gammick and Helzer allegedly were motivated by a desire to prevent Botello from obtaining or keeping his school district police job in retaliation for his actions against them and the nurse. FAC, ER p. 90. Gammick and Helzer further informed the chief that they would refuse to file any cases in which Botello had participated in any phase of an investigation, no matter how "preliminary" and no matter whether other investigators were available to testify in the case. FAC, ER p. 91. The position taken by Gammick and Helzer has "effectively rendered Botello useless as an

investigator," FAC ER p. 91, and ultimately resulted in the loss of his position with the school district, although he was retained in a lesser-paying position.[1]

REASONS FOR GRANTING THE PETITION

I.

THE PANEL HAS IMPROPERLY ADDED THE ELEMENT OF INTENT TO THE ABSOLUTE PROSECUTORIAL IMMUNITY ANALYSIS

The Supreme Court has long employed a "function" analysis to determine whether to grant absolute immunity for the acts of a judge or prosecutor. "Thus, in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'" *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S. Ct. 502, 508, 139 L. Ed. 2d 471 (1997), quoting *Forrester v. White*, 484 U.S. 219, 229, 108 S. Ct. 538, 545, 98 L. Ed. 2d 555 (19[illegible]). Only those functions "intimately associated with the judicial phase of the criminal process" have been protected by absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128 (1976). Acts deemed investigative or administrative in nature are not intimately associated with the judicial phase of the criminal process and do not give rise to absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209 (1993). For example, a judge's termination of a probation officer was deemed to be an administrative decision for which

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1. This allegation is not contained within the First Amended Complaint but was provided to the Ninth Circuit by plaintiff and accepted as true by the panel. *See* Appendix, p. 5a, n. 3.